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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE GOMEZ, *Petitioner,*
v.
UNITED STATES OF AMERICA

DIEGO CHAVEZ-TESINA, *Petitioner,*
v.
UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' JOINT REPLY BRIEF

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ARGUMENT

I. THE GOVERNMENT'S BRIEF FAILS TO ESTABLISH THAT CONGRESS INTENDED THE FEDERAL MAGISTRATES ACT TO AUTHORIZE DISTRICT JUDGES TO ASSIGN JURY SELECTION TO MAGISTRATES IN FELONY CASES EITHER AS A 'PRETRIAL' OR AN 'ADDITIONAL' DUTY

A. Jury Selection Is Not A 'Pretrial' Duty Assignable Under Section 636(b)(1)

Contrary to every court that has considered this issue,[1] and to the government's position in the court of appeals (see C.A. Br. 29-30), the government now argues for the first time that magistrates may conduct felony trial jury selection under 28 U.S.C. § 636(b)(1), which authorizes magistrates to "hear and determine any pretrial matter pending before the court." But this Court repeatedly has indicated, or even held, that jury selection is "part" of trial (Pets. Br. 15-16). Nothing in the legislative history suggests that Congress had a different view. Petitioners' analysis is also strongly supported by the structure of the Act.

The government argues that the reference in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), to jury selection being "a necessary part of trial by jury" was merely a way of emphasizing the importance of peremptory challenges (Br. 9-10). However, *Swain* specifically relied upon *Lewis* v. *United States*, 146 U.S. 370, 376 (1892), in which the Court stated that it was *"holding* . . . that making of [peremptory] challenges was an essential *part* of the trial . . ." (emphasis added). Decided shortly before the enactment of the Magistrates Act, *Swain* is particularly significant for its recognition that this "holding" reflects a *"long and widely held belief."* *Id.* at 219 (emphasis

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[1] The courts that have upheld delegation of felony jury selection to magistrates have relied exclusively upon the "additional duties" clause (Pets. Br. 5 n.7). So did the dissenters in *United States* v. *Ford*, 824 F.2d 1430, 1440-42 (5th Cir. 1987) (en banc) (Rubin, J., dissenting), *cert. denied*, ___ U.S. ___, 108 S.Ct. 741 (1988).

added). The Court's subsequent decisions have served to reinforce the view expressed in *Swain*.[2]

The government makes no showing that this "widely held belief" was not shared by Congress. The government simply ignores the judicial and statutory authority (Pets. Br. 15-16) holding that, because jury selection is part of trial, the defendant's right to be present at trial, the public's right to open trial proceedings, and the defendant's speedy trial rights, all attach prior to jury selection.[3] The double jeopardy cases, upon which the government relies (Br. 8), do not hold that jury selection is a pretrial proceeding. Rather, to accommodate the public's significant interest in the resolution of criminal charges on the merits, *see Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 509 n.8 (1984), these cases merely fix the swearing of the

[2] *See Ricketts* v. *Adamson*, 483 U.S. 1, ——, 107 S.Ct. 2680, 2682 (1987) ("Shortly after his trial commenced, while jury selection was underway . . ."); *Griffith* v. *Kentucky*, 479 U.S. 314, 317 (1987) ("On the first day of trial, the prosecution and defense attorneys conducted *voir dire* examination of the jury venire . . ."); *Batson* v. *Kentucky*, 476 U.S. 79, 91 n.15 (1986) (favorably quoting *Swain*); *id.* at 137 (Rehnquist, J., dissenting) (citing *Swain*); *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985) (equating *voir dire* with "any *other* trial situation") (emphasis added); *United States* v. *Powell*, 469 U.S. 57, 66 (1984) ("trials generally begin with *voir dire*"); *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) ("The trial judge's function at this point [*voir dire*] in the trial is not unlike that of the jurors later on in the trial."); *Carter* v. *Kentucky*, 450 U.S. 288, 291 (1981) ("At the trial, the *voir dire* examination of prospective jurors was conducted solely by the judge."). *See also United States* v. *Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (pursuant to his broad discretion to determine the "order of the trial," trial court held opening statements *before* jury selection).

[3] For example, while the government minimizes the significance of the placement of Fed. R. Crim. P. 23 and 24 in the chapter entitled "Trial," it avoids discussion of Rule 43(a), which requires the defendant's presence "at every stage of the trial *including* the impaneling of the jury" (emphasis added).

jury as the point at which the trial may not be "discontinu[ed]" without violating the defendant's constitutional rights. *Downum* v. *United States*, 372 U.S. 734, 737 (1963); *see Gori* v. *United States*, 367 U.S. 364, 368 (1961); *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949).[4]

The government's brief contains no analysis of how jury selection fits into the structure of § 636(b)(1). That subsection distinguishes between the more important, potentially dispositive, pretrial motions, as to which a magistrate may hear and recommend, subject to *de novo* review, § 636(b)(1)(B), and the less important, non-dispositive motions, which a magistrate may "hear and determine," § 636(b)(1)(A). Since jury selection is not one of the enumerated "dispositive" motions,[5] the government's position necessarily assumes that Congress viewed jury selection as a less-important, non-dispositive matter that magistrates would "determine" and then settle by "order," subject to district court review by a "clearly erroneous or contrary to law" standard. This is inconceivable.

By using the terms "determine" and "order," Congress could not have contemplated that the statute encompassed jury selection. Unlike pretrial scheduling, discovery, procedural, or other matters, the selection of a jury is not resolved by an "order." The closest concept in the jury selection process to a final "determination" or "order" is the swearing of the jury. But a magistrate may not select and *swear* the jury without

[4] The sole judicial authority the government cites for the proposition that jury selection is not part of trial is dictum in *Frazier* v. *United States*, 335 U.S. 497, 513 (1949), referring to jury selection as occurring "before trial" (Br. 8).

[5] The practice of holding jury selection shortly before or on the same day as opening statements and the evidentiary phase of trial also shows that Congress could not have intended it to fall within the "dispositive" motion paragraph, which requires the magistrate to make a full written recommendation and allows the parties 10 days to file written objections. § 636(b)(1)(C).

thereby depriving the parties of district court review by *any* standard.[6]

The non-dispositive, pretrial matters Congress intended to authorize under § 636(b)(1)(A) were far less important and far more routine than jury selection at a felony trial. *See, e.g.*, H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162 ("preliminary procedural motions") [hereinafter "1976 House Report"]; *id.* at 5 ("preliminary or pretrial processing of both criminal and civil cases"); *id.* at 6 ("pretrial motion or proceeding necessary to prepare a case for trial"); *id.* at 7 ("various procedural steps rather than . . . the trial itself"); *id.* at 9 ("preliminary motions and matters which can arise in the preliminary processing of either a criminal or a civil case"); 122 Cong. Rec. 35,182 (1976) ("preliminary procedural motions") (remarks of Rep. Railsback, a sponsor); *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 36 (1975) (report of the Judicial Conference) ("motions for continuances, questions on discovery, or matters of procedure") [hereinafter "1975 Senate Hearings"]. As Rowland F. Kirks, director of the Administrative Office of the United States Courts, explained:

> Under this language the court may authorize a magistrate to conduct pretrial conferences in civil and criminal cases, pursuant to the applicable rules of civil and criminal procedure, and to decide motions addressed to calendar matters such as motions for continuances and motions addressed to the pleadings which are not dispositive of litigation.

Improvement of Judicial Machinery: Hearings on H.R. 6150 Before the Subcomm. on Courts, Civil Liberties, and the

[6] This is so because of double jeopardy considerations and because the Federal Rules of Criminal Procedure only provide for questioning and challenging jurors *before* the panel is sworn.

Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 17 (1975).

Contrary to the government's argument (Br. 16), the absence of any framework for district court review of magistrate-conducted jury selection under § 636(b)(1)(A) strongly suggests that Congress did *not* intend to authorize jury selection as a "pretrial" matter. Congress believed that specific, *de novo* review procedures were necessary only for "more important," dispositive matters, as opposed to the "more routine" functions covered by § 636(b)(1)(A). 1975 Senate Hearings, *supra*, at 12 (remarks of William P. Westphal, chief counsel, Subcomm. on Improvements in Judicial Machinery). For example, Congress initially placed dismissal motions under Fed. R. Civ. P. 12(b) in the dispositive category, but subsequently moved such matters to the "non-dispositive" category precisely because they were regarded as "routine," 1975 Senate Hearings, *supra*, at 10 (remarks of Mr. Westphal), and "virtually ministerial," *id.* at 27 (remarks of Hon. Morey L. Sear, chairman, Legislative Committee, National Council of U.S. Magistrates), and thus did not necessitate *de novo* review. If Congress had understood jury selection to be a "pretrial matter" under § 636(b)(1), it would not have relegated it to the non-dispositive category with no procedure for, and a highly deferential standard of, review. In addition, given its overall purpose to "clarify" and "further define" magistrates' specific pretrial duties (Pets. Br. 20-21), it presumably would not have done so without *any* expression of such intent in the statutory language or the legislative history.

B. Jury Selection Is Not An 'Additional Duty' Assignable Under § 636(b)(3)

The government argues that, under § 636(b)(3), the "only limitations on the authority of courts to assign matters to magistrates are those posed by 'the Constitution and laws of the United States'" (Br. 11). Nevertheless, while refusing to concede that the *Constitution* bars magistrates from conducting felony trials (Br. 29 n.29), the government agrees that the *Magistrates Act* does so by omitting felonies from magis-

trates' trial jurisdiction (Br. 14). Thus, despite the government's broad construction of the "additional duties" clause, it must concede that Congress did not intend that clause to authorize delegation of adjudicative functions omitted from the balance of the Act.

We have already shown that Congress did not intend to authorize jury selection as a "pretrial matter" under § 636(b)(1) of the Act. The government concedes that Congress also did not intend to confer felony trial jurisdiction upon magistrates under the Act's trial provisions. Thus, the government can prevail only if it can establish that Congress did not intend its limitation on magistrates' felony trial jurisdiction to extend to the jury selection phase of trial. But its brief makes no such showing. Indeed, the Administrative Office itself, also believing that Congress had determined to deny magistrates felony trial jurisdiction, has advised district judges not to assign discrete trial functions to magistrates (Pets. Br. 18 n.11).

Contrary to the government's brief, petitioners do not contend that "Congress intended to assign magistrates only 'routine, nonjudicial burdens' and 'nonadjudicative tasks'" (Br. 20). We agree that Congress had an overall purpose, both in 1968 and 1976, to expand the adjudicatory authority of magistrates. But the issue is whether Congress intended § 636(b)(3) to be the vehicle for doing so. In this regard, Congress explained that the experimentation it had in mind under § 636(b)(3) consisted of "more administrative functions . . . in aid of the business of the courts." 1976 House Report, *supra*, at 12; *see* Pets. Br. at 21. Every function Congress listed as illustrative of the "additional duties" authorized by § 636(b)(3), such as reviewing default judgments, exonerating or forfeiting bail bonds, appointing counsel, or assisting in preparation of speedy trial plans, was administrative, ministerial, or non-adjudicative. *Id.* The experimentation that Congress had in mind *under § 636(b)(3)* was not the assignment of adjudicatory functions that it had declined to authorize elsewhere in the Act.[7]

[7] Ignoring Sen. Tydings' explanation that the original "additional duties" section was intended to "eas[e] some of the routine nonjudicial burdens of [district] courts" (Pets. Br. 19), the government relies upon his additional statement of intention that magistrates be available in "any capacity" (Br. 17 n.12), and two other general statements that did not, in context, involve delegation of adjudicatory authority over any part of a felony trial. The government omits the context of Sen. Tydings' statement: debate concerning a provision in the proposed legislation, *deleted* from the bill as enacted, granting additional "powers and duties" to magistrates as provided for by subsequent law or amendments to the Federal Rules of Criminal Procedure. *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 87 (1968). While Sen. Tydings explained that this provision was intended to "provide the statutory basis for district court experimentation . . . not in conflict with the Constitution or the laws of the United States," he simultaneously agreed that the Federal Rules of Criminal Procedure could not confer by rule additional "jurisdiction to try criminal cases other than petty or minor cases," *id.*, and that, in any event, such authority would be precluded by "the Constitution and the laws of the United States," *id.* at 88. Of course, the courts themselves gave a narrow construction of the original "additional duties" clause (*see, e.g.*, Pets. Br. 20 n.13), causing Congress to attempt to "clarify" the statute in 1976. It was Congress' intent in 1976 that has been the principal focus of the decisions upholding delegation of jury selection to magistrates.

The government also argues that, by 1976, "magistrate-conducted *voir dire* was already an accepted feature of practice under the Act" (Br. 20), and that Congress intended the practice to continue. But the additional materials to which the government's brief refers actually disprove its point and instead support our thesis that Congress did not intend to override the apparently exclusive practice under which, absent the defendant's consent, district judges conducted jury selection in felony trials.

The Judicial Conference's 1973 subcommittee report, upon which the government relies (Br. 21), surveyed the nation's 91 district courts, 87 of which responded, and established that only three districts had an actual "practice" in *criminal* cases of

delegating *voir dire* to magistrates: Western Michigan, but only in emergencies; Western Pennsylvania, but only on condition that the judge handle all legal questions, and Oregon, which used the practice rarely.[8] The report did not state whether *any* district held magistrate-conduct *voir dire* over a defendant's objection. Judicial Conference, *Report of the Subcommittee Assigned to Study the Conduct of Voir Dire by Federal Magistrates* 3-4 (1973) (emphasis added).

After reporting that the vast majority of districts *disapproved* of having magistrates select juries, particularly in criminal cases, *id.* at 4-8 and Appendix "A" and "B," the subcommittee likewise disapproved, reasoning: "The savings of judicial time are minimal; the risks of increased consumption of judicial time from error and duplication of effort are substantial." *Id.* at 8-9. The report recommended that districts experimenting with the practice limit its use to *civil* cases, and only with *consent*. *Id.* at 9. The Judicial Conference's Committee on the Operation of the Jury System formally "accepted" the report; the Committee on the Administration of the Federal Magistrates System "generally concurred" with it. Minutes of the August 1973 Committee Meeting at 19.

It is doubtful whether, in light of these events, any district courts were delegating jury selection to magistrates in criminal cases *over the defendant's objection* at the time Congress amended the Act in 1976. The Judicial Conference's 1975 "Jurisdictional Checklist" omitted any reference whatsoever to magistrates conducting *voir dire*. 1975 Senate Hearings, *supra*, at 24-26 ("Jurisdictional Checklist" distributed March 14, 1975). The only reference in the legislative record underlying the 1976 Act that magistrates were then conducting jury selection was Chief Judge Belloni's statement that, in Oregon, the magistrate had presided over jury selection.[9] However, he did not specify whether the magistrate had done so in criminal cases, or where the defendant objected (*see* Pets. Br. 24 n.15).

While Congress may have been aware in 1976 that a few districts had experimented with magistrate-conducted jury selection, almost exclusively in civil cases, and probably always with consent, the most salient circumstance is that the Judicial Conference, which drafted the legislation, did not propose the conducting of *voir dire* to Congress as a potential "additional duty." In light of the 1973 subcommittee report disapproving the practice in general, especially in criminal cases or over a party's objection, the most likely inference is that the Judicial Conference opposed it. Significantly, a representative of the National Council of Magistrates did request an amendment or an indication in the legislative history that Congress intended to authorize magistrates to select juries, 1975 Senate Hearings, *supra*, at 20 (Testimony of Magistrate Morey L. Sear), but Congress did not oblige. In sum, the legislative history establishes that Congress purposefully chose *not* to alter the existing practice in felony trials for district judges to preside at jury selection.

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[8] Statistics contained in the Senate hearing record on the 1973 Omnibus Judgeship Bill established that, during 1972 in the District of Oregon, 28 of the 30 magistrate activities characterized as "additional duties" under § 636(b) of the 1968 Act consisted of pretrial conferences or motions; only two activities were listed under the category "others." *The Omnibus Judgeship Bill: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 531 (1973). The statistics did not reveal whether any of these "other" activities consisted of jury selection in criminal trials or whether, if they did, the defendants had consented.

Additional districts had rules permitting delegation of *voir dire* but had not implemented such a practice.

[9] The government erroneously assumes (Br. 23 and n.20) that the Congress that amended the Magistrates Act in 1976 was "aware" of, let alone influenced by, additional testimony given in 1972-73 concerning separate legislation. Moreover, that testimony, and the experimentation with magistrate-conducted *voir dire* to which it referred, preceded the Judicial Conference's disapproval of the seldom-used practice.

The Court should decline the government's invitation to accord "significant weight" (Br. 26) to the suggestion by the Judicial Conference and the Administrative Office that jury selection may be delegated under the "additional duties" clause. The Administrative Office itself cautioned that its interpretation of the Magistrates Act "is not an official directive from the Judicial Conference of the United States or the Administrative Office or a substitute for decisional law," Administrative Office of the United States Courts, *Legal Manual for United States Magistrates* iii [hereinafter *"Legal Manual"]; id.* at 3-3 ("discussion . . . offered merely for guidance"), as the government candidly concedes (Br. 26 n.24). This caveat is particularly apt in light of the complete absence in the manual of any analysis or reference to statutory materials supporting the manual's application of § 636(b)(3). The manual also does not clearly extend its interpretation to criminal cases, nor does it provide guidance for cases in which a criminal defendant objects (*see* Pets. Br. 18 n.11). Meanwhile, the government's reliance upon the Administrative Office's view is selective: the government implicitly rejects the manual's failure to find authority for magistrates to conduct jury selection as a "pretrial matter." *Legal Manual*, *supra*, at 3-8.

The government next argues that assignment of felony jury selection to magistrates is not "inconsistent" with Fed. R. Crim. P. 24(a) because the rule states that the "court" "may" ask the questions during *voir dire* (Br. 12). However, the government does not dispute that, prior to the adoption of the Magistrates Act, the universal interpretation of the rule was that the "court" had to preside at jury selection (*see* Pets. Br. 22-23). There is no possible alternative construction. Indeed, the balance of Rule 24 authorizes only the "court" to permit additional peremptory challenges, subsection "b," or to impanel alternate jurors, subsection "c." The rule's use of permissive language merely gives district judges the option to permit opposing counsel to ask the *voir dire* questions, obviously in the court's presence. While Rule 24 does not explicitly prohibit magistrates from replacing the "court," neither did the Habeas Corpus Act. Nevertheless, because that act assigned responsibility for its application to "[t]he court, or justice, or judge," this Court held in *Wingo* v. *Wedding*, 418 U.S. at 468-69, 472, that assignment of such a function to a magistrate would be "inconsistent."

The government incorrectly suggests that, under Fed. R. Crim. P. 54, "the term 'judge' is *the* term" used when the rules intend to exclude a magistrate from exercising authority; thus, the government discounts Rule 24's use of the term "court" (Br. 12) (emphasis added). However, the Advisory Committee Notes accompanying the 1972 amendment to Rule 54 do not state that "judge" is the *exclusive* term in the rules meant to preclude magistrates from exercising authority. Were that the case, magistrates could conduct all aspects of the "trial" referred to in Rules 23-31. Nor does the government attempt to explain Rule 1, which states that the rules apply to magistrates only when "specifically provided in one of the rules," or the various definitions of "courts" referred to in the rules or related statutes, and cited in our brief (Pets. Br. 26-27), none of which is broad enough to include "magistrates." Indeed, the legislative history establishes that Congress was concerned, in light of *Wingo* v. *Wedding*, that federal laws using either term, "court" or "judge," might be narrowly interpreted to preclude magistrates from exercising authority. 1975 Senate Hearings, *supra*, at 20, 29. Nevertheless, Congress chose to make the "additional duties" clause subject to such laws, contrary to "pretrial matters" under § 636(b)(1).

The government also incorrectly argues both that Congress did not understand the Federal Rules of Criminal Procedure to be "laws" within the meaning of § 636(b)(3) and that "court rules ordinarily do not have that status" (Br. 12-13). During the Senate hearings, Magistrate Sear observed that the clause "'notwithstanding any provision of the law to the contrary' was intended by the drafters to be broad enough to include a magistrate where court and judge are used in statutes and *rules* . . ." 1975 Senate Hearings, *supra*, at 29 (emphasis

added); *id.* at 20. Judge Metzner, representing the Judicial Conference, agreed. *Id.* at 30. Moreover, just last year, the Court again noted that the Federal Rules of Criminal Procedure supersede inconsistent prior law and are "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia* v. *United States*, ___ U.S. ___, ___, 108 S.Ct. 2369, 2374 (1988); *see* 8 Moore's Federal Practice ¶ 1.02 (2d ed. 1989).

Contrary to the government's argument (Br. 13), § 636(a)(1), by transferring to magistrates the commissioners' existing authority under "law" and "rules," did not reflect any Congressional understanding that the Federal Rules of Criminal Procedure are not "laws." Prior to 1968, commissioners' duties were contained in myriad statutes and rules. Congress in 1968 merely wanted to be clear that magistrates were to assume *every* such duty, no matter what the source of authority.

Finally, contrary to the government's brief (Br. 37), petitioners' reference to Fed. R. Crim. P. 25(a) (Pets. Br. 24 n.15) was not a concession that the same judicial officer need not preside throughout the trial (Br. 37). To the contrary, Rule 25(a) permits one "judge" to substitute for another *only* where the first judge suffers "death, sickness or other disability" *and* the replacement judge "certif[ies] familiarity with the record."[10] If, as we argue, jury selection is part of trial, this provision also would be "inconsistent" with magistrate-conducted *voir dire:* it requires a "judge" to commence the trial and severely limits the circumstances under which such a judge can be replaced. In this case, a magistrate rather than a judge began the trial and the judge who replaced him did not read, let alone certify familiarity with, the trial record.

II. THE GOVERNMENT'S BRIEF FAILS TO ESTABLISH THAT, UNDER ART. III AND THE DUE PROCESS CLAUSE, A MAGISTRATE MAY CONDUCT JURY SELECTION IN A FELONY TRIAL OVER THE OBJECTION OF THE DEFENDANT

The government does not seriously argue that a magistrate may, consistent with Art. III and the Due Process Clause,

[10] The constitutionality of mid-trial judicial substitution is addressed *infra* at 14-15.

preside at a felony trial (*see* Br. 29 n.29). Without *any* constitutional analysis, the government instead characterizes *voir dire* as a "preliminary proceeding" (Br. 29), equates it with the *pretrial* suppression hearing procedure upheld in *United States* v. *Raddatz*, 447 U.S. 667 (1980), and concludes that the same result should apply here. But the government offers no reasoned basis for the Court to distinguish this case from the numerous authorities discussed in petitioners' opening brief (pp. 15-16, 35-40), and *supra* at 1-3, which characterize jury selection as part of trial.

Even if the Court nevertheless concludes that *voir dire* is preliminary to trial, *Raddatz* does not control this case. The government now exalts the criminal defendant's individual interest in the outcome of pretrial suppression hearings, citing *Raddatz's* observation that such motions may "determine the outcome of the case." *Raddatz*, 447 U.S. at 678 (Br. 32). But *Raddatz* then went on to fully accept the government's argument that the primary interest at stake in a suppression hearing has "nothing" to do with "the criminal law objective of determining guilt or innocence" and the defendant's greater interest in "'the reliability of jury verdicts'" (citation omitted). *Id.*[11]

Jury selection, on the other hand, plays a "critical function" in assuring the defendant's right to an impartial jury, and therefore the reliability of jury verdicts. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981) (and cases cited in Pets. Br. at 35-40). As discussed in our opening brief, the judge

[11] In *Raddatz*, the government argued that the primary interest at stake in a suppression hearing is "deterrence of official misconduct" rather than "the accused's paramount interest in liberty." Brief for the United States at 45, *United States* v. *Raddatz*, *supra*. "[T]he suppression remedy is ordinarily concerned with the deterrence of official misconduct or other societal interests and not with the more fundamental determination of guilt or innocence." *Id.* "Indeed, the defendant's stake in the outcome of a suppression hearing is significantly less than the individual interests implicated by various civil proceedings." *Id.* at 46.

conducting jury selection must make an infinite variety of judgments. These are often too subtle to be identified on the record or to be subject to review (Pets. Br. 42-45). The government's brief provides no authority for its bald claim that the demeanor of the participants in jury selection is rarely important and the overall process is rarely controversial (Br. 34-35).[12] In this case, trial counsel's failure to raise specific claims of prejudice before the district judge must be discounted both because of the inherent inability to recreate or request review of this process and because of the absence of any statutory or local procedure and standard for such review. *Compare United States* v. *Raddatz*, 447 U.S. at 680-81 ("the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself") (*see* Pets. Br. 48).

As discussed *supra* at 12, petitioners certainly do not "concede" that the same judge need not preside at jury selection and at the balance of the trial (Br. 37). There is substantial authority that the same judge must be present throughout the trial in order to provide essential continuity of knowledge and judgment (Pets. Br. 38-39). *See Simons* v. *United States*, 119 F.2d 539, 544 (9th Cir.), *cert. denied*, 314 U.S. 616 (1941) (defendant has Art. III right to presence of the same judge throughout trial, although he may waive it); *Freeman* v.

[12] The government's generalization that the *voir dire* process in federal court consists of nothing more than excusing jurors who immediately confess bias (Br. 34) is not supported by the record of this case. Demeanor proved relevant in the magistrate's decision to grant or deny the defendants' request to excuse several jurors. *See, e.g.*, 2/9/87 Tr. 70-71 (juror Kuadra excused by consent because of minor language difficulty); *id.* at 78-79 (juror Wong, who had tried marijuana, excused despite her belief she could be "impartial"); *id.* at 87-94 (over the government's objection, the magistrate excused two jurors with potential scheduling concerns, but denied defendants' request to excuse a third); *id.* at 124-26 (magistrate reversed himself and, with government's consent, excused juror who worked for Immigration and Naturalization Service but insisted she could be fair).

United States, 227 F. 732, 759-60 (2d Cir. 1915) (substitution of judge violated defendant's Sixth Amendment right to trial by jury); 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 392 (1982) ("In the absence of consent, it would seem that Rule 25(a) cannot be validly applied, and that the death or disability of the judge requires that a mistrial be granted.").[13] Whether or not Rule 25(a) is constitutional, it at least attempts to meet the above concerns by requiring absolute necessity for the substitution in addition to the successor judge's certification of familiarity with the record. The district judge below established no necessity for delegating jury selection, nor did he familiarize himself with the record.

Finally, the government greatly exaggerates the breadth of petitioners' Art. III argument (Br. 38). A narrow holding that jury selection in a federal felony trial may not be delegated to a magistrate over the defendant's objection would not threaten any provision of the Magistrates Act. This case does not involve the magistrates' consent trial jurisdiction or the Act's "pretrial" hearing provisions.

III. THE BASIC STRUCTURAL VIOLATION DEPRIVING PETITIONERS OF THEIR RIGHT TO A LIFE-TENURED ART. III JUDGE REQUIRES THAT THEIR CONVICTIONS BE REVERSED

The government's "harmless error" argument fails to consider that the error in this case involved a denial of a fundamen-

[13] More recently, other courts have noted, without deciding, that judicial substitution without consent raises significant Fifth and Sixth Amendment and Art. III problems. *See, e.g.*, *Whalen* v. *Ford Motor Credit Co.*, 684 F.2d 272, 273 n.4 (4th Cir.) (*en banc*), *cert. denied*, 459 U.S. 910 (1982); *United States* v. *Lynch*, 598 F.2d 132, 135 n.7 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Randel* v. *Beto*, 354 F.2d 496, 500-01 (5th Cir. 1965). *But see United States* v. *Boswell*, 565 F.2d 1338 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978) (declining to reach constitutional issue because substitution of magistrate for judge during closing arguments, while violative of Rule 25(a), was "harmless error"); *Connelly* v. *United States*, 249 F.2d 576, 580-81 (8th Cir. 1957) (upholding previous Rule 25(a) where judge died after verdict and provisions of statute were "strictly complied with").

tal "structural protection" built into the trial process by Art. III and Congress: the right to a life-tenured district judge during the critical jury selection phase of a felony trial. "Harmless error" analysis does not apply both because of the nature of this violation and because of the difficulty of identifying specific prejudice from such a violation in a particular case.

Initially, the government's brief does not even attempt to distinguish *Wingo* v. *Wedding*, in which the Court reversed the judgment denying a habeas corpus petition without subjecting the magistrate's involvement in recommending this result to "harmless error" analysis. Indeed, in *Wingo*, the district court reviewed the magistrate's recommendation far more closely than in this case: it listened to the entire tape recording of the hearing testimony before approving the magistrate's detailed findings and conclusions. 418 U.S. at 466. This rigorous review was far more likely to identify and correct error than the *ad hoc* procedure casually fashioned in this case to "review" the inherently less-reviewable *voir dire* process. *See also United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (judgment rendered by non-Art. III court automatically reversed).

In spelling out the contours of "harmless error" analysis, the Court in recent years has repeatedly noted that some errors "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). *See Bank of Nova Scotia* v. *United States*, ___ U.S. ___, ___, 108 S.Ct. 2369, 2375 (1988) (fundamental "structural protections"); *Rose* v. *Clark*, 478 U.S. 570, 578 n.6 (1986) (errors that "abort[] the basic trial process"). Unlawful discrimination in the selection of the grand or petit jury is such a defect because it "cast[s] doubt on the integrity of the whole judicial process." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion). *See Batson* v. *Kentucky*, 476 U.S. 79 (1986) (blacks improperly excluded from petit jury); *Vasquez* v. *Hillery*, 474 U.S. 570, 577-78 (1986) (blacks excluded from grand jury) (plurality opinion); *Ballard* v. *United States*, 329 U.S. 187 (1946) (women

excluded from grand jury). Similarly, even in the absence of specific error, a conviction must be reversed where a trial judge's inherent conflict of interest cast doubt on the integrity of the proceeding. *Tumey* v. *Ohio*, 273 U.S. 510 (1927) ("[n]o matter what the evidence was against him, [the defendant] had the right to have an impartial judge").

"Harmless error" analysis presupposes a trial by "a fairly selected, impartial jury, supervised by an impartial *judge*." *Rose* v. *Clark*, 478 U.S. at 579 (emphasis added). Such a trial cannot occur where the adjudication is by the "wrong entity." *Id.* at 578. As in *Wingo* v. *Wedding*, the magistrate who selected the jury in this case was empowered neither by statute nor by the Constitution. *See, e.g., Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976) ("federal courts . . . are courts of limited jurisdiction marked out by Congress"). Whether or nor the magistrate was "impartial," he was not a "judge," and thus was the "wrong entity" to conduct this proceeding. While he did not have a direct financial stake in the outcome comparable to that of the presiding officer in *Tumey* v. *Ohio* or the former U.S. Commissioners, he suffered from the inherent lack of independence that the Constitution's Framers thought essential, and therefore required under Art. III.

Where fundamental constitutional or statutory "structural protections" in the trial process are violated, the cases impose an irrebuttable "presumption" of prejudice. *Bank of Nova Scotia* v. *United States*, 108 S.Ct. at 2375 (and cases discussed therein). Thus, in *Waller* v. *Georgia*, 467 U.S. 39 (1984), the Court unanimously ordered a new suppression hearing, without examining the content of the existing hearing record, where the defendant had been denied his constitutional right to have such a hearing held in public. In extending to pretrial suppression hearings the Sixth Amendment right to a public trial, the Court agreed that the defendant did not have to show

"specific prejudice," *id.* at 49-50, reasoning: "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Id.* at 49 n.9.[14] *See also Peters* v. *Kiff*, 407 U.S. 503 (exclusion from jury of class of citizens requires reversal of the conviction even though "proof of actual harm, or lack of harm, is virtually impossible to adduce").

Similarly, the Framers "plainly thought" the benefits of the structural protections guaranteed by Art. III to be "real," even though, to paraphrase *Waller*, they are "frequently intangible, difficult to prove, or a matter of chance" (*see, e.g.*, Pets. Br. 30-34). Indeed, Art. III's structural protections, in the context of jury selection, go to the heart of the fact-finding process (Pets. Br. 35-40). The presiding officer must make countless discretionary judgments, the impact of which may not be apparent to the participants or sufficiently concrete to be the basis for complaint to a reviewing court. A defendant's strong constitutional interest in having the same judge establish control of the jury and acquire knowledge necessary for him to make discretionary judgments during subsequent stages of the trial is likewise subtle and "difficult to prove" in a particular case. *See supra* at 12, 14-15.

The government maintains that this is a "clear example" of a case in which the Court may conclude "with great confidence" that petitioners were not prejudiced (Br. 42-45). But the cases it cites involved evidentiary or procedural errors that either were *de minimis* in nature or gave rise to discrete, readily-identifiable prejudice more easily subject to "harmless error"

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[14] The principal underlying benefits of the public-trial guarantee identified in *Waller* are "'effective restraint on possible abuse of judicial power,'" 467 U.S. at 46 n.4, quoting *In re Oliver*, 333 U.S. 257, 270 (1948), and pressure upon all participants to perform more responsibly. These values are at least as "intangible" as the concerns underlying Art. III.

analysis.[15] More to the point are the jury selection cases in which the defective process employed created a potential for prejudice that review of the trial transcript could not dispel.[16] This, too, was such a case.

If the magistrate had conducted the entire trial without committing any specific mistake, we doubt the government would suggest such a fundamental structural error was harmless. Unless the government's trivialization of the jury selection process is accepted, we fail to see how confining this error to jury selection may lead to a different result.

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[15] *See, e.g., Bank of Nova Scotia* v. *United States, supra* (procedural errors in grand jury presentation); *Ross* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2273 (1988) (use of peremptory challenge to excuse juror who should have been excused for cause eliminated potential for prejudice, especially where state law intended peremptories to be so used); *Delaware* v. *Van Arsdall, supra* (improper curtailment of cross-examination concerning bias of a single prosecution witness); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (error in specific jury instruction where the evidence was overwhelming); *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam) (potential for prejudice in *ex parte* contact between judge and juror dispelled by post-trial hearing).

[16] *See, e.g., Batson* v. *Kentucky, supra* (unexplained pattern of racially-suspect peremptory challenges); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (exclusion of women); *Ham* v. *South Carolina*, 409 U.S. (1973) (failure to adequately inquire during *voir dire* about jurors' potential racial prejudice); *Peters* v. *Kiff, supra* (selection procedures that discriminate against blacks); *Aldridge* v. *United States*, 283 U.S. 308 (1931) (failure to adequately inquire about potential racial prejudice); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892) (denial of defendant's right to be present during *voir dire*).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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